# SUPREME COURT OF ALASKA

**Donald H. CARLSON, Warren Hart, Gerard Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on behalf of All Persons Similarly Situated, Appellants,**

**v.**

**STATE of Alaska, Commercial Fisheries Entry Commission, Appellee.**

**No. S-6590.**

June 21, 1996.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Loren Domke, Loren Domke, P.C., Juneau, for Appellants.

Stephen M. White, Marie Sansone, Assistant Attorneys General, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

Before RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, JJ.

## OPINION

COMPTON, Justice.

## I. INTRODUCTION

This is the second appeal from a class action challenging the State of Alaska's practice of charging nonresident commercial fishers licensing and limited entry permit fees which are three times greater than the fees charged resident commercial fishers. The class is comprised of "all persons who participated in one or more Alaska commercial fisheries at any time who paid

non-resident assessments to the State for commercial or gear licenses or permits." *Carlson v. State*, 798 P.2d 1269, 1270 (Alaska 1990) (*Carlson I*). In this appeal the class challenges the superior court's grant of summary judgment to the State. The class contends that the superior court misinterpreted our mandate on remand and that the fee differential violates the Commerce Clause[1] and Privileges and Immunities Clause[2] of the United States Constitution. We reverse and remand.

## II. FACTS AND PROCEEDINGS

This appeal, like *Carlson I*, contests the constitutionality of AS 16.05.480, AS 16.43.160 and Alaska Administrative Code (AAC) 20.05.240.[3] Under AS 16.05.480 a resident pays $30 per year for a commercial fishing license, while a nonresident pays $90 per year for the same license. Similarly, under 20 AAC 5.240(a)(1)-(4) nonresidents pay three times more for limited entry permits. The fee for limited entry permits is determined by the value of the permit;[4] the fee range, for residents, is from $50

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[1] The United States Constitution provides:

> "The Congress shall have power . . . To regulate commerce with foreign nations, and among the several States and with the Indian Tribes."

U.S. Const. art. I, § 8, cl. 3.

[2] The Privileges and Immunities Clause of United States Constitution provides:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

U.S. Const. art. IV, § 2.

[3] AS 16.43.160 is the authority under which the Commercial Fisheries Entry Commission (CFEC) adopted 20 AAC 5.240.

[4] The profitability of the different fisheries, and hence the value of permits, varies dramatically. For example, the average gross earnings per permit for the Chignik salmon seine fishery ranged from $ 88,709 to $ 265,525 for the years 1983 through 1993. The permit fee for this

to $250.[5] *See* 20 AAC 5.240(a)(1)-(4).

In *Carlson I* the class alleged:

> (1) violations of the Privileges and Immunities Clause and Commerce Clause; and (2) the absence of State statutory authority to charge this type of fee differential prior to January 1983. We rejected the class's second contention that the statute did not authorize the 3:1 differential prior to 1983.

*Carlson I*, 798 P.2d at 1278-79. However, as to the first issue we remanded the case and imposed on the State the burden of persuasion in defending the Commerce Clause and Privileges and Immunities challenges. *Id.* at 1274-78. With regard to the Privileges and Immunities Clause question we held:

> Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are prima facie a violation of it . . . . Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal.

*Carlson I*, 798 P.2d at 1274 (citations omitted). In imposing the burden of persuasion on the State on this issue we adopted the

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fishery is $ 250 for residents and $ 750 for nonresidents. During the same time period the average gross earnings per permit for the Bristol Bay herring spawn on kelp fishery ranged from $ 847 to $ 1613. The permit fee for this fishery is $ 50 for residents and $ 150 for nonresidents.

[5] The State notes that there is no evidence that this fee differential has discouraged nonresidents from participating in Alaska's commercial fisheries. During the period between 1982 and 1992 the participation of nonresidents in Alaska fisheries continued to increase. The State also emphasizes that virtually every state that has a commercial fishing industry has higher nonresident licensing and permitting fees. In many of these states the differential between resident and nonresident fees exceeds the one contested here.

Wisconsin Supreme Court's analysis. *See Taylor v. Conta*, 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (Wis. 1982). In doing so we held that "the burden of persuasion to demonstrate justification is properly on the state."[6] *Carlson I*, 798 P.2d at 1276.

We framed the issue on remand as, "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account." *Carlson I*, 798 P.2d at 1278. We also held that the revenues derived by the State from petroleum production are "analytically[ ] equivalent to 'taxes which only residents pay.' " *Carlson I*, 798 P.2d at 1278.

On remand the parties cross-moved for summary judgment, each proposing a different method by which to compare the fees being paid by nonresidents with the expenditures of state revenues to which the nonresidents make no contribution (the costs to residents). The class proposed what it termed the *per capita* formula. The *per capita* formula computes the contribution made by each resident to the cost of maintaining the commercial fisheries and compares this with the fee differential. The State proposed what it termed the *pro rata* formula. The *pro rata* formula in effect compares the total contributions made to the cost of commercial fisheries by residents to the total fees paid by nonresidents. The superior court concluded that under this method

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[6] We similarly imposed the burden of proof on the Commerce Clause challenge on the State. We held:

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

*Carlson I*, 798 P.2d at 1277 (quoting *Main v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986)).

of analysis, residents paid by way of taxes (or their analytical equivalent) substantially more than nonresident fishers paid. In reaching this conclusion, the superior court applied the State's proposed formula to the categories of expenses accepted by us in *Carlson I*.[7] As the licensing and permitting fees charged nonresidents did not exceed the amount paid by residents, the superior court concluded that the differential did not violate either the Commerce Clause or the Privileges and Immunities Clause. The class appeals.

## III. DISCUSSION

### A. Standard of Review

Both parties correctly argue that the Commerce Clause and the Privileges and Immunities Clause challenges to AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 present questions of constitutional law which we review *de novo*. *See Wright v. Black*, 856 P.2d 477, 479 (Alaska 1993). The issue of whether the superior court erred in adopting the *pro rata* formula to calculate the contribution to commercial fisheries management made by residents is also an issue of law which we review *de novo*. *Langdon v. Champion*, 745 P.2d 1371, 1372 n. 2 (Alaska 1987).

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[7] The State presented additional budget figures which included an analysis of every state agency for the years 1981 through 1993. The State claims that these figures included expenditures to which only Alaska residents contributed and which benefitted only commercial fishers. The class requested a stay and a reopening of discovery to address these new figures. The superior court determined that as it had not relied on the new figures in granting summary judgment, any dispute over these figures was moot. However, the court did reserve the right to reconsider this decision if this court determined that the class's *per capita* method should have been employed.

**B. The Challenged Fee Differential under the Commerce Clause**

The class contends that two recent Supreme Court decisions require that the different fees charged to residents and nonresidents under AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 be analyzed under the Commerce Clause.[8] *See Oregon Waste Systems v. Dep't of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 1350, 128 L.Ed.2d 13 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992). The class argues that the fee differentials in these statutes and regulations violate the negative Commerce Clause.[9] The class

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[8] In *Carlson I* we left open the question of whether this case was governed by the Commerce Clause. We noted that earlier Supreme Court cases had suggested that the Commerce Clause does not apply to fish until the fish are actually harvested. *Carlson I*, 798 P.2d at 1276 n. 4 (citing *McCready v. Virginia*, 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer v. Witsell*, 334 U.S. 385, 394-395, 68 S.Ct. 1156, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948)).

[9] The grant of regulatory power to Congress implicit in the Commerce Clause has been interpreted to have a "negative" aspect "that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 1349, 128 L.Ed.2d 13 (1994) (*citing Wyoming v. Oklahoma*, 502 U.S. 437, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992)). A negative Commerce Clause analysis has two steps. First, the court must determine whether the challenged statute discriminates against interstate commerce or "regulates evenhandedly with only 'incidental' effects on interstate commerce." *Oregon Waste Systems*, 114 S.Ct. at 1350 (citations omitted). Second, "[i]f the restriction is discriminatory—i.e., favors in-state economic interests over their out-of-state counterparts—it is virtually *per se* invalid." *Id.* at 1347. A restriction found to be *per se* invalid must be struck down unless the state can "show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Id.* at 1351 (citations omitted). The justifications for a discriminatory tax or restriction must pass the strictest

argues AS 16.05.480, AS 16.43.160 and 20 AAC 5.240 are *per se* invalid under the Commerce Clause. A substantial portion of the class's briefs is devoted to analogizing the different commercial licensing and permit fees charged residents and nonresidents to surcharges the states of Oregon and Alabama imposed on out-of-state waste. The Supreme Court struck down these surcharges. *Oregon Waste Systems*, 114 S.Ct. at 1355; *Chemical Waste*, 504 U.S. at 334. The class contends that under the reasoning employed in *Oregon Waste Systems* and *Chemical Waste*, the 3:1 fee differential is tantamount to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 114 S.Ct. at 1350.

*Oregon Waste Systems* does not require that the fee differential challenged herein be evaluated under the Commerce Clause. In both *Oregon Waste Systems* and *Chemical Waste*, the Court found taxes imposed on out-of-state waste which were greater than the taxes imposed on in-state waste violated the negative Commerce Clause. In applying the negative Commerce Clause analysis in *Oregon Waste Systems*, the Court emphasized that the Commerce Clause prohibits states from unjustifiably discriminating against or burdening the interstate flow of articles of commerce. *Oregon Waste Systems*, 114 S.Ct. at 1349. The Court went on to hold that "[i]t is well-established, however, that a law is discriminatory if it 'tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State.'" *Oregon Waste Systems*, 114 S.Ct. at 1350 (quoting *Chemical Waste*, 504 U.S. at 342, ___ S.Ct. at ___).

Unlike the fee differentials in *Oregon Waste Systems* and *Chemical Waste*, the fee differentials at issue in this case are not

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scrutiny. *Id.* at 1351. However, if the restriction is nondiscriminatory it is valid unless the burden it imposes on interstate commerce "is clearly excessive in relation to the putative local benefits." *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)).

predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits. The Supreme Court has consistently analyzed statutes which purportedly classify on the basis of residency under the Privileges and Immunities or the Equal Protection Clauses.[10] In *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948), the Court evaluated South Carolina shrimping license fees, which were one hundred times greater for non-residents than for residents, under the Privileges and Immunities Clause. There the Court observed that the Privileges and Immunities Clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[11] *Toomer*, 334 U.S. at 395.

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[10] *See United Bldg. & Const. v. Mayor & Council of Camden*, 465 U.S. 208, 215-19, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) (analyzing a municipal resident hiring preference under the Privileges and Immunities Clause); *Hicklin v. Orbeck*, 437 U.S. 518, 524, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978) (evaluating under the Privileges and Immunities Clause the Alaska Hire Law which preferenced Alaska residents in hiring); *Sosna v. Iowa*, 419 U.S. 393, 406, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) (reviewing Iowa's durational residency requirement for divorces under the Privileges and Immunities Clause); *see also Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 383, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978) (stating that the Privileges and Immunities Clause "has been interpreted to prevent a State from imposing unreasonable burdens on Citizens of other States in their pursuit of common callings within the State" (citations omitted)).

[11] In *Anderson v. Mullaney*, 191 F.2d 123 (9th Cir.1951), *aff'd* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952), the Ninth Circuit struck down on Commerce Clause grounds an Alaska territorial statute which charged non-resident fishermen a higher license fee than resident fishermen. On certiorari the Supreme Court affirmed on Privileges and Immunities rather than Commerce Clause grounds, following *Toomer v. Witsell*. Assuming that the Commerce Clause would also apply to cases of this nature, it is difficult to believe that a license fee differential which passes muster under the Privileges and Immunities analysis would nonetheless be an unconstitutional discrimination against interstate

### C. The Challenged Fee Differential under the Privileges and Immunities Clause

The class contends also that the nonresident fee differential violates the Privileges and Immunities Clause of the United States Constitution. The Privileges and Immunities Clause is not absolute. "[I]t does not preclude disparity of treatment [of citizens of other states] in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396. A claim that a residency classification violates the Privileges and Immunities Clause requires a two-step inquiry:

> First, the activity in question must be sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the Privileges and Immunities Clause. . . .
>
> Second, if the challenged restriction deprives nonresidents of a protected privilege, we will invalidate it only if we conclude that the restriction is not closely related to the advancement of a substantial state interest.

*Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 101 L.Ed.2d 56 (1988) (internal quotations and citations omitted).

We determined in *Carlson I* that commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause. 798 P.2d at 1274. However, the class claims that for us to find for the State on the relatedness prong of the inquiry, the State "must demonstrate that behind the nonresident surcharge or differential is a[sic] (1) substantial reason advancing a legitimate State policy and (2) the means employed by the statutory scheme must be closely tailored and have a substantial relationship to a legitimate interest served by the statute." Appellant's Brief at 27.

We have already made the first inquiry. In *Carlson I*, we held that equalizing the burden of fisheries management, "where

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commerce.

residents pay proportionately more in foregone benefits than nonresidents for fisheries management," was a substantial State interest. *Id.* at 1278. However, we concluded that the record did not contain sufficient evidence to determine whether the differential in fees charged residents and nonresidents was sufficiently related to this interest to justify such disparate treatment. *Id.* at 1278.

The class questions the relatedness of the fee differential to the burden of fisheries management borne by residents. It analogizes this case to other Supreme Court cases, and challenges our conclusion in *Carlson I* that petroleum revenues are the analytical equivalent of taxes. The class argues that *Oregon Waste Systems* prohibits the State from arguing that the fee differentials do not discriminate against nonresidents because they merely impose on nonresidents their share of the costs of fisheries management. It claims that under the reasoning of *Oregon Waste Systems*, neither general tax revenues nor oil royalty revenues can be viewed as the residents' contributions to fisheries management.[12]

There are two flaws with the class's argument. First, *Oregon Waste Systems* was a Commerce Clause case. *See Oregon Waste Systems*, 114 S.Ct. at 1349. Although the reasoning in Privileges and Immunities Clause cases has been used in Commerce Clause cases, it is not analytically sensible to do the reverse in this case. In this case the Privileges and Immunities Clause question turns on whether there is a sufficient relationship between the higher fees charged nonresidents and the State's interest in imposing on nonresidents their share of the costs for managing the State's commercial fisheries. In *Oregon Waste Systems*, the issue was whether the interstate and intrastate taxes are imposed on sufficiently equivalent events such that they could be considered proxies for each other. *See Id.* at 1352-53. These are different

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[12] The class calls this its "attribution of tax revenues" argument.

inquires for which the analysis is not interchangeable.[13]

Second, the class's argument demonstrates a lack of understanding of our holding in *Carlson I*. Contrary to the class's contentions, we did not advocate the kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*. In *Carlson I* we did not advance a compensatory tax doctrine which would impose on nonresidents their entire share of the costs of commercial fisheries management, while resident fishers' share of these costs was borne by the entire population of the State. Rather, we held that the issue is

> whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

*Carlson I*, 798 P.2d at 1278. The disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries. The fee differential merely balances out "any conservation expenditures from taxes which only residents pay." *Toomer*, 334 U.S. at 399.[14] In *Carlson I* we held that the State bore the burden

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[13] Additionally, the Supreme Court in *Oregon Waste Systems* had reasons other than the disparity between the events being taxed for finding that the Department of Environmental Quality's compensatory tax argument was disingenuous. For example, the Court expressed concern over the fact that the out-of-state surcharge was actually assessed on in-state shippers who already paid Oregon income taxes, the very tax the surcharge supposedly balanced out. *See Oregon Waste Systems*, 114 S.Ct. at 1353.

[14] In *Oregon Waste Systems*, the Court gave no indication that it intended to cast doubt on this aspect of *Toomer*.

of persuasion on this issue. 798 P.2d at 1276. This burden should be met by calculating the contribution made by residents and comparing it with the challenged fee differentials.

### D. The State's *Pro Rata* Method of Calculating the Amount Residents Contribute to Fisheries Management

To establish "practical equality" between residents and nonresidents, the State must demonstrate that the higher fees charged nonresidents are equivalent to the burden borne by residents as measured by the "residents' *pro rata* shares of state revenues to which nonresidents make no contribution." *Carlson I*, 798 P.2d at 1278. The *per capita* formula propounded by the class is the correct method for calculating the contribution made by residents.

Under the *per capita* formula the resident contribution is calculated in the following manner: (Fisheries Budget/Alaska Population) X (percentage of State Budget from oil revenues/1.0). *See* Appendix A. Once this computation is made the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.

The State advocates a different formula for computing the resident contribution. The State's formula utilizes a three-step approach. The State would (1) calculate the expenditures or costs of the commercial fisheries (enforcement and conservation); (2) determine the resident and nonresident commercial fishers' respective *pro rata* shares of those expenditures; and (3) compare the percentage of its respective *pro rata* share each group is paying. *See* Appendix A.

The State's formula differs from the class's when it comes to deciding how to determine the numbers to be used in steps two and three. Although the formulae are theoretically different and are calculating different quantities, the significant difference between the two proposed formulae concerns how the residents' *pro rata* share is calculated. As discussed above, the class argues that the amount used as the divisor of the commercial fisheries expenditures from taxes which only residents pay must be the

total number of Alaskans. It correctly asserts that using this number will allow the court to determine the *per capita* contribution actually being made by each of the resident permit holders. On the other hand, the State argues that the holdings in *Toomer* and *Carlson I* mandate that the residents' contribution should be determined by dividing the fisheries' expenditures from taxes by the number of resident permits issued in any given year.[15] The State is wrong. As stated above, in *Carlson I* we held that the relevant inquiry was

> "whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state- provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account."

*Carlson I*, 798 P.2d at 1278. Thus, we ordered the superior court to compare the relative burden placed on resident and nonresident commercial fishers. The *per capita* method does just this. Had *Carlson I* mandated a comparison of the expenditures made by the State to the contribution made by nonresident fishers, the State's theory would be correct.[16] Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services. It is this quantity which must be equivalent to the fee differential for the fees to be constitutional under the *Carlson I* analysis. *See*

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[15] This is not exactly accurate because the State's formula never calculates the actual amount that each individual resident is purported to contribute. Rather, the State's formula calculates the percentages of their fair share of costs residents and nonresidents pay.

[16] However, this would be just the kind of compensatory tax rationale which the Supreme Court struck down in *Oregon Waste Systems*.

*Carlson I*, 798 P.2d at 1278.[17]

As we have concluded that the resident contribution must be calculated using the class's *per capita* formula, we remand the case for the application of this formula. If under the formula the fee differential exceeds the resident contribution, the State will have failed to demonstrate that the means employed by its statute have a substantial enough relationship to the legitimate interest of the statute to survive Privileges and Immunities Clause review. Conversely, if the superior court finds that the fee differential is not greater than the resident contribution, the State has successfully carried its burden of proving that the means employed by its statutory scheme are substantially related to the legitimate interest served by the statute. On remand the superior court shall address issues relating to the additional budget figures presented by the State. It will need to determine whether to accept these new figures and decide whether it should grant a stay and reopen

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[17] The State also argues that the *per capita* formula should be rejected because it has never been used by any court in any context. The State cites a string of equal protection cases to support this assertion. *See Baldwin*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978); *LCM Enterprises, Inc. v. Town of Dartmouth*, 14 F.3d 675 (1st Cir. 1994); *Johns v. Redeker*, 406 F.2d 878 (8th Cir. 1969). However, these equal protection cases have no bearing on the suitability of the *per capita* approach in this case. In *Baldwin* the comparison being made was between the state's costs for maintenance of the big-game populations, not the contributions made by resident big game hunters to the maintenance of big- game populations. *Baldwin*, 436 U.S. at 389. Additionally, in *Baldwin* the calculations were being viewed under the rational basis test, a more lenient standard than the intermediate scrutiny required in this case. *Baldwin*, 436 U.S. at 390-91. Similarly, *LCM Enterprises* is inapplicable because it too involved the application of the rational basis test, which only requires that the classification being challenged is rationally related to the legitimate state interest. *LCM Enterprises*, 14 F.2d at 679. *Johns* also has no relevance to the issue at hand because the court in *Johns* does not discuss the method the trial court used to determine the resident contribution which was being compared with the higher fees charged to nonresidents. *Johns*, 406 F.2d at 883.

discovery in order to allow the class to respond to the State's presentation of these new figures.

### E. Prejudgment Interest of the Unlawful Portion of the License Fees from the Date the Class Action Was Filed

The class seeks a refund under AS 43.10.210,[18] of all unlawfully exacted fees from the date of filing the lawsuit with statutory prejudgment interest calculated under AS 45.45.010. In *Carlson I* we held that AS 43.15.010 would govern any refund in this case, and that if the class succeeded on its constitutional claims it could only recover unlawfully collected fees if it could satisfy the protest requirement of AS 43.15.010. 798 P.2d at 1279-80. We remanded for further findings on whether the State had waived the protest requirement, thereby allowing a refund of all fees not barred by the statute of limitations. *Id.* The superior court found that the State had not waived the protest requirement.

The class admits that it could not have satisfied the protest requirement for the taxes paid prior to the filing of the lawsuit, and thus does not seek a refund of any unlawfully assessed fees paid prior to June 22, 1984. However, the class claims that the filing of the complaint in the case at bar fulfills the protest requirement.

Although the State does not address this issue in its brief, the record indicates that the State agrees that those fees which were paid after June 22, 1984, were paid under protest sufficient to permit a refund under AS 43.10.210. This does not mean that the State concedes that any refund would be due if the class

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[18] AS 43.15.010 was renumbered 43.10.210. AS 43.10.210(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if
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> (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax . . . .

succeeds. The State argued below that it only had conceded that the protest requirement of AS 43.10.210 had been met, and that this "is merely one precondition to the '[r]ecovery of overpayments and protested payments.'" Because the State does not brief this issue, it is impossible to know whether it would still make this argument.

If on remand the superior court determines that the class has prevailed, the superior court must also decide whether the filing of this suit constituted notice sufficient to comply with the protest requirement of AS 43.10.210(a), and whether prejudgment interest is due under AS 45.45.010.

## IV. CONCLUSION

We conclude that this appeal does not implicate the Commerce Clause. We REVERSE the superior court's approval of the State's *pro rata* formula of calculating and comparing the taxation burden placed on resident and nonresident commercial fishers, and we REMAND for application of the class's *per capita* formula. We also order that on remand the superior court address the unresolved issues concerning the appropriate budget items to be considered in determining the State's expenditures (i.e., resident contributions). Additionally, if the superior court finds for the class, it must determine the date from which the class should be given a refund, and what, if any, interest is due on that refund.

## V. APPENDIX

The following is a comparison of the two proposed formulae which uses the statistics proffered by the State for the years 1982 through 1989. It is difficult to compare the State's and class's formulae because they calculate and compare different quantities in an attempt to measure what residents and nonresidents are paying. The class's formula calculates the fee differential which would be allowable, while the State's formula computes the respective percentages of costs of running the commercial fisheries which residents and nonresidents could pay and still be "treated similarly."

**A. Application of the Class's *Per Capita* Formula**

The class's *per capita* formula: Fisheries Budget/Alaska Population X Percentage State Budget from Oil Revenues.

| | | | |
|---|---|---|---|
| 1982: | $29,000,000 / 500,000[19] | X 83% | = $48.14 |
| 1983: | $31,000,000 / 500,000 | X 81% | = $50.22 |
| 1984: | $34,000,000 / 500,000 | X 82% | = $55.76 |
| 1985: | $34,800,000 / 500,000 | X 82% | = $57.07 |
| 1986: | $34,500,000 / 500,000 | X 86% | = $59.34 |
| 1987: | $29,600,000 / 500,000 | X 76% | = $44.99 |
| 1988: | $29,300,000 / 500,000 | X 83% | = $48.64 |
| 1989: | $29,900,000 / 500,000 | X 82% | = $49.04 |

Under the *per capita* formula the allowable fee differential will vary from year to year. For example, in 1982 the difference between a resident and nonresident permit could not substantially exceed $48.14, while in 1986 the difference could not substantially exceed $59.34.

**B. Application of the State's *Pro Rata* Formula**

The State's formula calls for the comparison of two calculations: (1) Fair Share of Resident Costs = (Residents' *Pro Rata* Share[20] x (Fisheries Budget x Percentage of State Revenue from Oil); and (2) Fair Share Nonresident Costs = (Nonresidents' *Pro Rata* Share[21] x (Fisheries Budget x Percentage of State Revenue from Oil).

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[19] For the purpose of this example we will assume that the population of Alaska is 500,000.

[20] Residents' *Pro Rata* Share: (Percentage of Permits Held by Residents) X (Fisheries Budget).

[21] Nonresidents' *Pro Rata* Share: (Percentage of Permits Held by Nonresidents) x (Fisheries Budget).

The following two tables are the application of these formulae.

Percentage of State's Commercial Fishery Expenditures Paid By Residents:

| Fiscal Year | Column 1 % of Limited Entry Permits Held By Residents | Column 2 Total Expenditures By Four Agencies For Commercial Fishery Management | Column 3 Residents' *Pro Rata* Share of Total Expenditures | Column 4 % of the Total State Revenues To Which Nonresidents Make No Contribution |
|---|---|---|---|---|
| 1982 | 83% | $ 29.0 | $ 24.1 | 83% |
| 1983 | 84% | $ 31.0 | $ 26.0 | 81% |
| 1984 | 85% | $ 34.0 | $ 28.9 | 82% |
| 1985 | 84% | $ 34.8 | $ 29.2 | 82% |
| 1986 | 84% | $ 34.5 | $ 29.0 | 86% |
| 1987 | 82% | $ 29.6 | $ 24.3 | 76% |
| 1988 | 82% | $ 29.3 | $ 24.0 | 83% |
| 1989 | 82% | $ 29.9 | $ 24.5 | 82% |

| Column 5 Residents' *Pro Rata* Share of Expenditures From Revenues To Which Non-residents Make No Contribution | Column 6 Residents' Fees Paid For Licenses and Permits | Column 7 Total Amount Paid By Residents To Partici-pate in Commercial Fisheries | Column 8 % Paid By Residents of Their *Pro Rata* Share of State Expendi-tures For Commercial Fisheries |
|---|---|---|---|
| $ 20.0 | 1.3 | $ 21.3 | 88% |
| $ 21.1 | 1.3 | $ 22.4 | 86% |
| $ 23.7 | 1.2 | $ 24.9 | 86% |
| $ 23.9 | 1.5 | $ 25.4 | 87% |
| $ 24.9 | 1.5 | $ 26.4 | 91% |
| $ 18.5 | 1.7 | $ 20.2 | 83% |
| $ 19.9 | 2.0 | $ 21.9 | 91% |
| $ 20.1 | 2.0 | $ 22.1 | 90% |

Percentage of State's Commercial Fishery Expenditures Paid By NonResidents:

| Fiscal Year | Column 1 % of Limited Entry Permits Held By NonResidents | Column 2 Total Expenditures By Four Agencies For Commercial Fishery Management | Column 3 NonResidents' *Pro Rata* Share of Total Expenditures |
|---|---|---|---|
| 1982 | 17% | $29.0 | $4.9 |
| 1983 | 16% | $31.0 | $5.0 |
| 1984 | 15% | $34.0 | $5.1 |
| 1985 | 16% | $34.8 | $5.6 |
| 1986 | 16% | $34.5 | $5.5 |
| 1987 | 18% | $29.6 | $5.3 |
| 1988 | 18% | $29.3 | $5.3 |
| 1989 | 18% | $29.9 | $5.4 |

| Column 4<br>Nonresidents' Fees Paid For Licenses and Permits | Column 5<br>% Paid By Nonresidents of Their *Pro Rata* Share of State Expenditures For Commercial Fisheries |
|---|---|
| $1.3 | 27% |
| $1.2 | 24% |
| $1.0 | 20% |
| $1.2 | 21% |
| $1.3 | 24% |
| $1.6 | 30% |
| $2.3 | 43% |
| $2.2 | 41% |

Under the *pro rata* formula the differential is constitutional as long as the percentage of fair costs nonresidents are paying does not exceed the percentage of fair costs that residents are paying. Thus, the fee differential was constitutional in 1983 because residents paid 86% of their share and nonresidents only paid 24% of their share. As stated in the text of the opinion, the flaw with this formula is that it treats the resident fishers as if they alone are paying the tax equivalent (percentage of revenues to which nonresidents make no contribution). For this formula to accurately calculate the resident fishers' contribution, it would need to divide the residents' *pro rata* fair share by the population of Alaska and then multiply by the number of resident fishers.

RABINOWITZ, Justice, dissenting.

The majority concludes that since *Oregon Waste Systems v. Department of Environmental Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), was decided under the Commerce Clause as opposed to the Privileges and Immunities Clause, its reasoning is inapposite here. I cannot agree.

The United States Supreme Court has long acknowledged "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause — a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism. . . ." *Hicklin v. Orbeck*, 437 U.S. 518, 531-32, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978). It has, in fact, endorsed the methodology of referring to Commerce Clause precedent in deciding claims based solely on the Privileges and Immunities Clause. *Id. See also Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir.1985) ("The two clauses are part of the same document, drafted by very intelligent and careful men; why would they have wanted the same discrimination against nonresidents to be tested by a different standard, depending on which clause was cited in the complaint?").

I do not mean to suggest that the two clauses are completely interchangeable. The differences between them, however, appear to primarily involve matters of scope as opposed to content. For

example, the market regulator—market participant doctrine can shield a state from Commerce Clause attack but not from a claim based on the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council v. Mayor*, 465 U.S. 208, 221-22, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984). On the other side of the equation, the Commerce Clause protects corporations, while the Privileges and Immunities Clause does not. *Paul v. Virginia*, 75 U.S. (8 Wall) 168, 19 L.Ed. 357 (1869).

In this way discrimination predicated somehow on state affiliation can fall within the scope of the Privileges and Immunities Clause alone, the Commerce Clause alone, both clauses, or, for that matter, neither.[1] Once it has been determined that a discriminatory policy falls within the purview of one or both of these clauses, however, I am not persuaded that the methodology of the two should diverge in any significant respect. The extent to which the interpretation of these two clauses has historically been interwoven confirms this assessment.

Further, the level of scrutiny triggered by a discriminatory policy that falls within the scope of either of these clauses appears to be very nearly identical. Professor Tribe has observed that the standard of review employed in Privileges and Immunities cases is "almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."[2] Similarly, in *Oregon Waste Systems*, the Supreme Court observed that Commerce Clause cases "require that justifications for

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[1] A well-recognized example of this last category would be a policy of discriminating against nonresidents in the granting of recreational game or fishing license fees. This kind of state discrimination does not implicate the Commerce Clause since it does not significantly burden interstate commerce, and it does not implicate the Privileges and Immunities Clause because it does not involve a fundamental right. *See, e.g., Baldwin v. Fish and Game Comm'n of Montana*, 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354 (1978).

[2] Lawrence H. Tribe, *American Constitutional Law* § 6-35, at 544 (2d ed.1988).

discriminatory restrictions on commerce pass the 'strictest scrutiny.'" *Oregon Waste Systems*, 114 S.Ct. at 1351. Under both clauses, the burden is placed on the state to provide a sufficient justification for its discriminatory policy.

Considering the significant similarities between the two clauses, it not surprising that in *Carlson I* we simply referenced our Privileges and Immunities Clause analysis in order to dispose of the Commerce Clause issue, concluding that "[t]he analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated." *Carlson I*, 798 P.2d at 1276. Indeed, we went on to state that

"[i]t would be anomalous . . . to conclude that a law facially discriminating against interstate commerce could pass muster under the Privilege and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation."

*Id.* at 1277 n. 5. In the wake of the United States Supreme Court's ruling in *Oregon Waste Systems*, however, the majority has reconsidered this position and concluded that, in fact, "the analysis is not interchangeable."

It is obvious that the fee discrepancy in this case implicates the Privileges and Immunities Clause. The policy is facially discriminatory, and it impairs an interest that is "fundamental" for purposes of Privileges and Immunities Clause analysis. Given the exceptionally close relationship between this clause and the Commerce Clause, I cannot, as noted above, join in the majority's summary rejection of the United States Supreme Court's reasoning in *Oregon Waste Systems*.

The justification offered by Oregon for discriminating against out-of-state interests in *Oregon Waste Systems* is very similar, if not identical, to the justification advanced by the State in the case at bar. The primary rationale is that out-of-state interests ought to be made to bear their "fair share" of the costs that their activities impose on the state. *Oregon Waste Systems*, 114 S.Ct.

at 1351; *Carlson I*, 798 P.2d at 1272. In both cases, the "share" or contribution of in-state interests is augmented by general state tax revenues, or their analytical equivalent, in order to justify the tax or fee discrepancies.[3]

In *Carlson I*, we concluded that this kind of augmentation was acceptable under the holding of *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460 (1948). In *Toomer*, the Supreme Court stated, in dicta, that a state could "charge non-residents a differential which would merely compensate the State . . . for any conservation expenditures from taxes which only residents pay." *Id.* at 399. The Supreme Court in *Oregon Waste Systems*, however, expressing its reluctance to "plunge . . . into the morass of weighing comparative tax burdens by comparing taxes on dissimilar events[,]" explicitly rejected this type of justification for state discrimination in the Commerce Clause context. *Oregon Waste Systems*, 114 S.Ct. at 1353 (citations and internal quotation marks omitted).

The majority correctly observes that the compensatory tax doctrine, focusing on whether or not the taxes which allegedly cancel each other out are imposed on "substantially equivalent

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[3] Although the majority asserts that the fee-shifting we authorized in *Carlson I* is not the same kind of fee-shifting denounced by the Supreme Court in *Oregon Waste Systems*, I think that the similarities between the two far outweigh any potential differences. The approach authorized by the majority seems to place greater emphasis on the theoretical equality of individual contributions than the Oregon tax did. There is, however, no indication that the Oregon tax was designed to impose on out-of-state interests their "entire share" of solid waste disposal costs nor, for that matter, that the shares of disposers of in-state waste, who paid an $0.85 per ton fee, were to be borne by the entire population. More importantly, the decision in *Oregon Waste Systems* did not turn on the fact that the surcharge was excessive but rather on the conclusion that any surcharge was constitutionally offensive under the circumstances. Consequently, the majority's endorsement of the class's *per capita* approach does not sufficiently distinguish the fee discrepancies here from those in *Oregon Waste Systems*.

events," finds its origins in Commerce Clause cases. It does not follow from this observation, however, that the doctrine has no place in Privileges and Immunities analysis. There is nothing inherent in this doctrine, or the policy concerns behind it, that indicates that it should only apply to discriminatory state taxation challenged under the Commerce Clause.

In *Armco, Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), the Supreme Court struck down a discriminatory tax on the grounds that "manufacturing and wholesaling are not 'substantially equivalent events' " on which compensating taxes might be imposed. *Id.* at 643. In that case, West Virginia had imposed a wholesale gross receipts tax from which local manufacturers were exempt. The policy underlying the exemption was that it would put in-state manufacturers who were wholesaling their products in West Virginia on equal footing with their out-of-state competitors who were functionally exempt from West Virginia's manufacturing tax.[4] The Court rejected this justification, observing that

> [i]f Ohio or any of the other 48 States imposes a like tax on its manufacturers — which they have every right to do — then Armco and others from out of state will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax. *Id.* at 644.

Likewise, the Supreme Court in *Oregon Waste Systems* observed that Oregon's compensatory tax theory "ignore[s] the fact that shippers of waste from other States in all likelihood pay income taxes in other States, a portion of which might well be used to pay for waste reduction activities in those States." *Oregon Waste Systems*, 114 S.Ct. at 1353 n.7.

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[4] Presumably the only reason that the Privileges and Immunities Clause was not invoked in this case — where it would seem to be a natural choice — is that the plaintiff was a corporation not entitled to protection under that clause. As such, the *Armco* case provides an excellent example of how the "substantially equivalent events" test should apply with equal force regardless of which clause is invoked.

In this respect the "substantially equivalent events" test essentially serves to identify a significant logical flaw that often infects "fair share" justifications for discriminatory taxes. I can see no reason to assume that this flaw is any less serious when it is exposed through litigation based upon the Privileges and Immunities Clause than it is when challenged under the Commerce Clause.[5]

The justification advanced by the State in this case suffers from precisely the same defect alluded to in both *Armco* and *Oregon Waste Systems*. Specifically, a fisher from Oregon who purchases a commercial license in Alaska will no doubt be under an obligation to pay Oregon income taxes, a portion of which probably will have been used for conservation costs in that state. Accordingly, the fee discrepancy places the Oregon fisher, as a nonresident, at a competitive disadvantage. In other words, both the Alaska fisher and the Oregon fisher are obliged to contribute to a general tax fund[6] from which their respective States may draw monies to support local fisheries, but only the Oregon fisher is being called upon to pay enhanced fees.

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[5] A commentator has observed:

> While differences exist between the purposes and functions of the two constitutional clauses, they clearly exert overlapping spheres of influence. To hold the same tax invalid under one clause because it does not meet the substantially equivalent events requirement of the compensatory tax test, but valid under the other clause because it is important . . . that a state have power to preserve and regulate the exploitation of an important resource through means of a functionally compensatory tax, is surely to elevate form over substance.

Jeffrey J. Lamontagne, Note, *Oregon's Wasted Effort: The Supreme Court's Inability to Adapt its Compensatory Tax Doctrine to Solid Waste Regulations*, 19 Wm. & Mary Envtl. L. & Pol'y Rev. 345, 360 (1995) (citations and internal quotation marks omitted).

[6] The Alaskan fisher "contributes" in the form of foregone benefits from petroleum revenues.

> Restating our holding in *Carlson I*, the majority concludes that "[t]he disparate fees charged to nonresidents will not offend the Privileges and Immunities Clause if the differential does not exceed the contribution made by residents, because the differential will be justified as imposing on nonresidents their share of the costs of commercial fisheries."

Implicit in this analysis is that a share of this state's petroleum revenues, the analytical equivalent to general tax revenues, should be attributed to the resident fishers in calculating their contribution. Since I believe that the United States Supreme Court's holding in *Oregon Waste Systems* effectively forecloses this method of justifying a discriminatory tax, I cannot agree.

On the basis of the Supreme Court's reasoning in *Oregon Waste Systems*, I conclude that the fee discrepancies authorized by AS 16.05.480, AS 16.43.160 and 20 AAC 05.240 violate the Privileges and Immunities Clause of the Constitution of the United States of America.

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE**

| | | |
|---|---|---|
| DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs, | ) | |
| vs. | ) | Case No. 3AN-84-5790 Civil |
| STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant. | ) | |

**DECISION AND FINAL ORDER ON RECONSIDERATION OF THE COURT'S AUGUST 12, 1993 ORDER AND FINAL DECISION GRANTING THE STATE'S MOTION FOR SUMMARY JUDGMENT**

The Supreme Court remanded this case to the superior court by a decision October 5, 1990. The Court's direction to the superior court was to have further proceedings consistent with the opinion issued. The opinion issued affirmed the trial court in part, and reversed the trial court in part.

The Supreme Court affirmed the trial court's rejection of plaintiffs' contention that the a 3:1 fee ratio was not authorized by statute prior to 1983; it reversed the trial court's ruling that the class would not be able to obtain a refund in any event, and directed the trial court to decide whether the state waived the otherwise necessary protest (the trial court having since ruled that the State did not waive the protest requirement) and limited to two

years the statute of limitations applicable, if the necessary protest of tax or a waiver of the protest requirement was made.

The Supreme Court also reversed the trial court's determination that summary judgment should be granted to the State of Alaska as to Privileges and Immunities and Commerce Clause challenges. The test the trial court is to apply regarding these clauses is "whether residents and similarly situated non-residents are being treated with substantial equality." Non-residents may be charged higher fees to make up for costs not paid for by the resident's fee rate, but paid by the residents through other taxes or their economic equivalent.

On remand the court granted summary judgment, and then granted reconsideration, which placed the motion for summary judgment back before the court.

Then the case was reassigned to the undersigned in June 1993, at which point the trial court reviewed the file and after various status hearings made the ruling that in calculating the amount of supplemental fee that the Constitution would allow the State to charge a given non-resident the proper method was to divide the total resident-only taxes (or their equivalent) spent on the commercial fishery by the population of Alaska. To this the State sought reconsideration, the court sought the class's input, and that issue is before this court to resolve by this decision.

After the trial court's ruling greatly enlarging the "divisor", the State prepared a full study of all state expenditures made in support of commercial fishing as well as additional "foregone benefits" contributed to the commercial fisheries and included them in the Supplemental Memorandum in Support of Its Motion for Summary Judgment on Remand filed November 12, 1993. The plaintiff class has opposed the court allowing the State to present additional information about the cost of fishing management. The court ruled that the court would receive additional information related to the cost of the State fishery in its order of August 12, 1993.

## DECISION UPON RECONSIDERATION OF THE COURT'S AUGUST 12, 1993 RULING

The court has considered the parties' arguments regarding the proper divisor to use in calculating the acceptable discrepancy between resident and non-resident fees for fishers and HEREBY VACATES its prior ruling that *pro rata* as used in *Carlson vs. State*, 798 P2d 1269, (Alaska 1990), means *per capita*.

If the theoretical basis allowing higher fees for non-residents is the recovery of costs related to benefits provided, then the costs are properly divided by the number of users. Using a *per capita* approach, such costs could *never* be recovered in a limited entry fishery. Though recovery of 100% of costs is only theoretical, a *per capita* limitation makes no sense. For example, if *all* the fishers were non-residents, it would be necessary to have as many fishers as there are Alaskans in order to achieve fair contribution by the non-resident fishers.

The State's citation to the tuition cases also convinces the court that its August 12, 1993, ruling was in error and that the proper division of the costs of management paid only by residents by taxes and benefits foregone ought to be the number of fishers, not the number of Alaskans.

## THE MOTION FOR SUMMARY JUDGMENT

Given the court's decision that it is the number of users which determines the *pro rata* cost of the benefits received it is evident that the disparity between resident and non-resident fees for commercial fishing licenses and permits is not in violation of the Privileges and Immunities or Commerce Clauses of the Constitution. Residents pay by way of taxes, or the economic equivalent of taxes, i.e., benefits foregone; substantially more than the non-resident fishers pay toward the benefits received based on the categories of expenses previously accepted by the parties and recognized by the court in *Carlson*. See, State's Supplemental Memorandum of November 1, 1993, pp. 7-8, Figures A, B. The proportion of costs paid by the non-residents regardless of the non-resident differential is always less than the proportion paid by residents. See, State's Memorandum in Support of State's Motion

for Summary Judgment, March 5, 1991, pp. 10-19; State's Supplemental Memorandum in Support . . . November 2, 1993, pp. 3-10.

The reconsideration of the August 12, 1993, ruling renders moot the parties' disputes whether the State can include other expenses than those presented at the original summary judgment motion (the court ruled that the State could), whether a stay should be granted to allow additional discovery by the plaintiff class (the court ruled that the stay was denied), and just what, if any, other items presented by the State as support of the fee disparity should be recognized by the court.

It is this last area of contention that the court will address further if the Supreme Court disagrees with its final ruling on the meaning of *pro rata* as applied to this case. When and if the court is faced with identifying additional expenses, the class will need to identify the specific portions of the budgetary analysis with which it takes issue.

The State's Motion for Summary Judgment is GRANTED. The Plaintiff class Motion for Summary Judgment is DENIED.

DATED at Anchorage, Alaska, this 25th day of July, 1994.

/s/ Peter A. Michalski

PETER A. MICHALSKI
SUPERIOR COURT JUDGE

# SUPREME COURT OF ALASKA.

**Donald H. CARLSON, Warren Hart, Gerald Haskins, Stephen R. Libby, Earl Weese, and Lyla C. Weese, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Appellants,**

**v.**

**STATE of Alaska, Commercial Fisheries Entry Commission, Appellee.**

**No. S-3290.**

Oct. 5, 1990.

Loren Domke, Domke and Olmstead, P.C., Juneau, for Appellants.

Margot O. Knuth, Asst. Atty. Gen., and Douglas B. Baily, Atty. Gen., Juneau, for Appellee.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

## OPINION

COMPTON, Justice.

This is a class action challenging Alaska's practice of charging nonresident commercial fishermen three times as much as resident fishermen for commercial licenses and limited entry permits. The class, consisting of "all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits," alleges violations of two federal constitutional provi-

sions: the Privileges and Immunities Clause,[1] and the Commerce Clause.[2] The class also challenges the charging of differential fees from June 22, 1978 until January 1, 1983 under former 20 Alaska Administrative Code (AAC) 05.220(a) as being without statutory authority. The class seeks declaratory and injunctive relief as well as a refund of excess payments under the current "unconstitutional" regime and the 1978-1982 "unconstitutional" and "unauthorized" regime. The superior court denied relief.

## I. FACTUAL AND PROCEDURAL BACKGROUND

### A. STATUTORY HISTORY

In 1949 the territorial legislature passed a law imposing a $50 commercial fishing license fee on nonresident fishermen and a $5 fee on residents, a 10:1 ratio. Ch. 66, § 2, SLA 1949. The law was struck down as violative of the Privileges and Immunities Clause of the Federal Constitution. *Mullaney v. Anderson,* 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458 (1952).

Beginning with statehood in 1959, the state charged differential licensing fees to resident and nonresident commercial fishermen pursuant to statute. Nonresident fishermen using most types of gear were charged three times the resident fee. *See* former AS 16.05.550, AS 16.05.570-.640; Ch. 94, art. III, § 8, SLA 1959.

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[1] The Privileges and Immunities Clause provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

U.S. Const. art. IV, § 2, cl. 1.

[2] The Commerce Clause provides:

> The Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3.

Exceptions to this rule existed for setnet or long line gear under former AS 16.05.560 (2:1 ratio) and for commercial operators of a single small boat under former AS 16.05.650 (no distinction).

The Limited Entry Act became effective April 27, 1973. Ch. 79, SLA 1973, *codified* in Alaska Statutes, Title 16, Article 43.

Alaska Statute 16.43.010(a) described the purpose of the Limited Entry Act as follows:

> It is the purpose of this chapter to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination.

Alaska Statute 16.43.100(a)(6) provided that the Commercial Fisheries Entry Commission (CFEC) "shall . . . establish qualifications for the issuance of entry permits. . . ." AS 16.43.100(b) provided that the CFEC "may do all things necessary to the exercise of its powers under this chapter, whether or not specifically designated in this chapter." AS 16.43.110 provided that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter."

Alaska Statute 16.43.160 was first enacted in 1973. Ch. 79, SLA 1973. Former AS 16.43.160 provided in part:

> (a) The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits to reflect the cost of administering this chapter. Fees collected under this section shall be paid into the general fund.
>
> (b) Annual fees established under this section shall be no less than $10 and no more than $100 and shall reasonably reflect the different rates of economic return for different fisheries.

Between 1973 and 1978, commercial fishermen were thus required to pay for both a gear license and a limited entry permit.

While gear license fees for nonresident commercial fishermen were thrice, in most instances, what they were for residents initially, entry permit fees did not distinguish between residents and nonresidents. *See* former 20 AAC 05.220 (1974).

During the 1977 legislative session, the legislature revised the commercial fishing licensing scheme. Ch. 105, SLA 1977. Gear licenses were abolished altogether. Ch. 105, § 19, SLA 1977. Alaska Statute 16.43.160(a) was amended by removing the phrase "to reflect the cost of administering this chapter." Thus, AS 16.43.160(a) then read in part: "The [CFEC] shall establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Additionally, AS 16.43.160(b) was amended to increase the maximum amount the CFEC could charge for a license from $100 to $750. Ch. 105, § 15, SLA 1977. These changes became effective January 1, 1978. Ch. 105, § 20, SLA 1977.

On the effective date of these changes, the CFEC could no longer charge differential gear license fees, or for that matter any gear license fees. On this same date, the CFEC amended 20 AAC 05.220 to provide for a 3:1 nonresident fee differential for entry permits. *See* Ch. 105, § 20, SLA 1977; former 20 AAC 05.220.

It was the view of then Attorney General Avrum Gross, as demonstrated by a letter from him to then Governor Jay Hammond, that "the fees now collected for [gear] licenses would be incorporated administratively by the [CFEC] into the fee for a permit as would the 3-1 nonresident-resident fee differential." Moreover, the increase in the maximum chargeable entry fee (from $100 to $750) was believed by Attorney General Gross, as shown by another letter to Governor Hammond, to "allow entry permit fees to incorporate the license fees which would be eliminated." The letters also show that he anticipated the enactment of regulations to accomplish this incorporation.

In 1981, an informal opinion of the attorney general was issued concerning whether the 3:1 fee ratio of 20 AAC 05.240(a) was authorized by statute, following a request by the chairman of the

CFEC. 1981 Informal Op. Att'y Gen. 984. Without citing any directly supportive authority, the author concluded the differential was not authorized. *Id.* The regulations attorney for the CFEC disagreed with this assessment.

In 1982, the legislature again amended AS 16.43.160(b). This section now reads:

> (b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

The 1982 amendment thereby gave more certain authority to the CFEC to charge a 3:1 fee differential. This amendment was effective January 1, 1983. Ch. 79, § 3, SLA 1982.

## B. HISTORY OF STATE EXPENDITURES AND REVENUES

The record contains a lengthy and detailed analysis of the revenues and expenditures connected with fisheries management for fiscal years 1978-1984.

The state contended below that the 3:1 fee ratio partially reimburses the state for that portion of the costs of fisheries management, enforcement and conservation attributable to nonresidents. The state, in essence, argued that it is subsidizing all commercial fishermen by not charging any of them (resident or not) his share of the costs of fisheries management.

The state's analysis identified four sources as the aggregate cost of fisheries management. First, the state included the annual operating budget of the CFEC itself (cost of issuing licenses and permits, etc.). These amounts are evidenced by state budget reports for each year in question.

Second, the state included 40.6% of the annual operating budget of the Department of Public Safety (DOPS), representing the amount spent by state law enforcement agencies in support of

commercial fisheries enforcement. The amount of the DOPS operating budget is also evidenced by state budget summaries for each year.

Third, the state included the annual operating budget of the Division of Commercial Fisheries, a division of the Department of Fish and Game. This division determines "how many fish are available each year for commercial harvesting." These expenditures are also voluminously documented by budget reports. Not counted as expenditures were "[a]dministration and [s]upport costs."

The state also included the annual operating budget of the Fisheries Rehabilitation Enhancement and Development (FRED) Division of the Department of Fish and Game. FRED

> rehabilitates and enhances fisheries by determining where and when fish are needed or wanted to be, and then producing the fish at that time and place. This is done by conducting extensive research studies and then working on the variety of projects that will implement the plans decided upon, which include establishing and running fish hatcheries, fertilizing lakes, planting fish, and cleaning up streams used by androgenous fish.

FRED's expenditures are also documented by budget breakdowns for each year. Not counted in FRED's expenditures were "[a]dministration and [s]upport costs" and sport fishing expenditures.

The state then attributed to nonresidents a percentage of these costs equal to the percentage of entry permits held by nonresidents in each year.[3]

Finally, the state presented evidence of revenues collected in connection with commercial fishing. The state included two

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[3] The evidence of record shows that this percentage of costs actually favors nonresidents, who catch more fish *per capita* and hence derive more benefit from maintenance expenditures.

sources: commercial entry permit fees and commercial fishing license fees. These numbers are again documented by budget reports.

The state then compared the percentage of expenditures attributable to nonresidents with the percentage of revenues taken in from nonresidents. In each year nonresident revenues from the sources counted falls considerably short of nonresident expenditures. *See* Appendix.

The class does not seriously dispute the factual accuracy of the foregoing figures. The amounts cited by both litigants as to expenditures suffer from only minor, immaterial discrepancies. Rather, the class disputed the inclusion of certain costs and the exclusion of certain revenues in the analysis. First, the class contended that the proper framework for examining whether nonresidents were contributing their share to fisheries management would be to contrast CFEC revenues with only CFEC expenditures, i.e. "expenses directly traceable to the costs of issuing permits and licenses." Including only these expenditures, the 3:1 fee ratio scheme results in a net profit to the state.

Alternatively, the class contended that if inclusion of all fisheries management expenditures in the analysis was appropriate, then "all sources of revenue [to the state] attributable to [nonresident] commercial fishermen" should also be included. The class urged the inclusion of "revenues derived indirectly from commercial fishermen from tax shifting by the fish processing industry, federal funds, marine fuel taxes, corporate and individual income taxes, and other sources of revenue derived from commercial fishermen." Including these indirect revenues, only in fiscal years 1983 and 1984 did expenditures exceed revenues.

## C. PROCEDURAL BACKGROUND

On its first motion for summary judgment, the state prevailed on some issues, with the court finding material questions of fact remaining on others. On the Privileges and Immunities issue, the superior court held, relying on *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1156, 92 L.Ed. 1460, *reh'g denied*, 335 U.S. 837, 69

S.Ct. 12, 93 L.Ed. 389 (1948), that while the issuance of licenses to fish commercially was sufficiently important to implicate the Privileges and Immunities Clause, the state had demonstrated a "permissible" reason for the discrimination. This reason was "to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of this state, which costs are largely borne by the residents through general fund expenditures." The superior court decided that an analysis of whether this purpose was being met by the 3:1 fee ratio required comparison of all revenues collected directly from commercial fishers, with all the expenditures by the State on maintaining, conserving, or managing the fishery. It rejected the class' two proposed methods of determining fair share contribution: 1) comparing CFEC revenues with CFEC expenditures and 2) comparing all revenues from all sources (including corporate taxes, business license taxes, fuel taxes, etc.) garnered from nonresident commercial fishers with all expenditures to maintain fisheries.

The superior court found that the state had presented evidence "of the operating budgets of the four entities of the State which are concerned with enforcement, operation, management, and conservation of the fisheries. The State's evidence indicates further that the operating budgets of these entities exceeded, in the years 1979 through 1984, the amount they collected in resident and non-resident licensing . . . ." Nevertheless, the superior court also found that there was a material question of fact as to whether the operating budgets truly reflected the costs of fisheries management.

As to the Commerce Clause challenge, the court held that commercial fishing in this state is within the reach of the Clause. It also held that the fee differential discriminated against interstate commerce on its face. However, the court reasoned that the same "legitimate local purpose" (ensuring that nonresidents pay their fair share of management costs) justified the discrimination, assuming the fee differential bore a substantial relationship to the purpose. Again, the court found the same question of material fact: whether the state's figures truly reflected the costs of

management. The court also held that there is no less restrictive way to ensure that nonresidents pay their fair share of the costs of fisheries management than to collect the money from them as a fee.

The superior court further held that the CFEC had implied authority to enact 20 AAC 05.220(a) and charge a 3:1 fee differential before 1983. The court offered several factors supporting its conclusion. First, it noted that the 3:1 entry fees were enacted concurrent with the abolition of 3:1 gear license fees. The court reasoned that the 1977 amendments, as reflected by the attorney general's letters, were intended to substitute differential entry permit fees for differential gear fees. The court also noted that the Limited Entry Act did not forbid fee ratios. The court added that AS 16.43.160(a) did not merely authorize the issuance of licenses, but instead directed the CFEC to "establish annual fees for the issuance and annual renewal of entry permits or interim use permits." Finally, the court reasoned that the deletion of the requirement that permit fees "reflect the cost of administering this chapter" from AS 16.43.160(a), along with the increase in maximum chargeable license fees, were indicative of intent to allow the CFEC to recoup to the General Fund whatever monies were expended for the management of fisheries.

Finally, the superior court held that even should the class eventually prevail, its members would not be entitled to a refund of fees extracted under an unconstitutional or unauthorized statute.

Later, the superior court reconsidered its decision that there were questions of material fact concerning whether the figures submitted by the state sufficed. Based on the state's more expansive documentation of costs and expenditures (discussed in section I B, *supra* ), the court held that no question of material fact remained regarding the accuracy of the state's calculations.

The class appeals.

## II. DISCUSSION

### A. SUMMARY JUDGMENT WAS IMPROPERLY GRANTED AS TO THE CLASS' PRIVILEGES AND IMMUNITIES AND COMMERCE CLAUSE CHALLENGES

The Privileges and Immunities Clause of article IV, section 2 of the United States Constitution provides: "[t]he citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

> The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy . . . . In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

*Toomer v. Witsell,* 334 U.S. 385, 395-96, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, *reh'g denied,* 335 U.S. 837, 69 S.Ct. 12, 93 L.Ed. 389 (1948) (footnote omitted).

Less favorable treatment by the state towards nonresidents runs afoul of the Privileges and Immunities Clause if: 1) the activity in question is " 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the [clause]," and 2) "[it] is not closely related to the advancement of a substantial state interest." *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65, 108 S.Ct. 2260, 2264, 101 L.Ed.2d 56 (1988) (citations omitted). *See also Toomer*, 334 U.S. at 396, 68 S.Ct. at 1162; *Robison v. Francis*, 713 P.2d 259, 263-64 (Alaska 1986). In determining whether the discrimination bears a close relationship to the permissible purpose, the availability of less restrictive means is relevant. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284, 105 S.Ct. 1272, 1278, 84 L.Ed.2d 205 (1985); *Robison*, 713 P.2d at 264.

Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are prima facie a violation of it. *See Toomer*, 334 U.S. at 397, 68 S.Ct. at 1162; *Mullaney v. Anderson*, 342 U.S. 415, 417-18, 72 S.Ct. 428, 429-30, 96 L.Ed. 458 (1952). *Compare Baldwin v. Fish & Game Comm'n of Montana*, 436 U.S. 371, 388, 98 S.Ct. 1852, 1862, 56 L.Ed.2d 354 (1978) (sport or recreational hunting not protected by Privileges and Immunities Clause). Thus the questions here are whether the state has a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal. The class argues both that there is no "substantial reason" for the discrimination, and that even if there is, the fee differential is not "closely related" to furthering the purpose.

In *Toomer*, South Carolina sought to justify a 100:1 ratio by arguing that its "conservation program for [fisheries] requires expenditure of funds beyond those collected in license fees--funds to which residents and not non-residents contribute." *Toomer*, 334 U.S. at 398, 68 S.Ct. at 1163. The Court held that it was permissible "*to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.*" *Id.* at 399, 68 S.Ct. at 1163 (emphasis added). However, the Court also held that South Carolina had not established a relationship between the justification and the differential fee. "Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, *or that any substantial amount of the State's general funds is devoted to [fisheries] conservation.*" *Id.* at 398, 68 S.Ct. at 1163 (emphasis added).

*Mullaney* dealt with Alaska's territorial predecessor to the differential fee scheme at issue here. The territorial scheme imposed a $5 license fee on resident commercial fishermen, and a $50 fee on nonresidents, a 10:1 ratio. Ch. 66, § 2, SLA 1949; *see also Mullaney*, 342 U.S. at 416, 72 S.Ct. at 429. In

*Mullaney*, Alaska, as did South Carolina in *Toomer*, asserted that the discriminatory fee was justified by a substantial reason; to wit, "the higher cost of enforcing the license law against nonresident fishermen." *Id.* at 417-18, 72 S.Ct. at 430.

The *Mullaney* Court reiterated its suggestion in *Toomer* that this would be a sufficient reason to impose a discriminatory fee, but again held that there was "nothing to indicate that [the fee differential] 'would merely compensate' for the added enforcement burden." *Id.* at 418, 72 S.Ct. at 430. According to the *Mullaney* Court, "[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations. But something more is required than a bald assertion to establish a reasonable relation between the higher fees and the higher cost to [Alaska]." *Id.*

Subsequent to *Mullaney*, non-fisheries cases have resounded the "more than a bald assertion" theme. In *Austin v. New Hampshire*, 420 U.S. 656, 95 S.Ct. 1191, 43 L.Ed.2d 530 (1975) the Court found

> no support in the record for the assertion of the court below that the [tax] creates no more than a "practical equality" between residents and nonresidents when the taxes paid only by residents are taken into account. "[S]omething more is required than bald assertion--by the state court or by counsel here-to establish the validity of a taxing statute that on its face discriminates against nonresidents."

*Id.* at 666 n. 10, 95 S.Ct. at 1197 n. 10 (citation omitted).

In *Hicklin v. Orbeck*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), Alaska's local hire law failed Privileges and Immunities scrutiny for this same reason.

> [A]lthough the statute may not violate the [Privileges and Immunities] Clause if the State shows "something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed," . . . and, beyond this, the State "has no burden to prove that its laws are not violative of the . . .

> Clause," . . . certainly no showing was made on this record that nonresidents were "a peculiar source of the evil" Alaska Hire was enacted to remedy, namely, Alaska's "uniquely high unemployment." . . . What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents—especially the unemployed Eskimo and Indian residents—were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities; and that the employment of nonresidents threatened to deny jobs to Alaska residents only to the extent that jobs for which untrained residents were being prepared might be filled by nonresidents before the residents' training was completed.

*Id.* at 526-27, 98 S.Ct. at 2488 (citations and footnote omitted).

How much record support is needed under these cases to demonstrate a sufficiently "close connection" to a legitimate state purpose remains unclear. One court has noted:

> [T]here is a certain ambiguity in the Supreme Court cases concerning the burden of going forward with the evidence and the burden of persuasion of the challenger and the state. . . . Justice Brennan dissenting in Baldwin discussed the burdens on the challenger and the state in a privileges and immunities case as follows: "Although a State has no burden to prove that its laws are not violative of the Privileges and Immunities Clause, its mere assertion that the discrimination practiced against nonresidents is justified by the peculiar problem nonresidents present will not prevail in the face of a prima facie showing that the discrimination is not supportable on the asserted ground."

Justice Brennan, writing for the Court in *Hicklin*, discussed the burdens in a privileges and immunities case in the following language: "For although the statute may not violate the Clause if the State shows 'something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is

aimed,' and, beyond this, the State 'has no burden to prove that its laws are not violative of the . . . Clause,' certainly no showing was made on this record that non-residents were 'a peculiar source of the evil [the statute] was enacted to remedy . . . .' "

Professor Tribe comments on the burden of proof in a privileges and immunities case as follows: "The standard of review employed in *Toomer* . . . characterized by a shift in the burden of proof to the discriminating state and by an insistence on a fairly precise fit between remedy and classification, is almost as demanding as that elaborated by the Warren Court in equal protection and first amendment strict scrutiny."

Another commentator . . . described the burden of proof rule established in *Hicklin* as follows: "[Justice Brennan in *Hicklin*] departed from the traditional allocation of the burden of proof in cases arising under the clause. Before *Hicklin*, the nonresident had the burden of disproving the validity of the justifications offered by the state. *Hicklin* places a duty on the state to demonstrate a relationship between the presence of nonresidents and the problem which the state purports to alleviate. The shift of the burden of proof in this first prong discards the presumption of constitutionality that a statute normally enjoys and is inconsistent with Justice Brennan's position in Baldwin that the state had this burden only after the nonresident had made a 'prima facie showing that the discrimination is not supportable on the asserted grounds.' While Justice Brennan offered no explanation for this shift, it is consistent with his concern for the individual's interest.

Although the United States Supreme Court cases are not clear, we conclude that the challengers of the statutes in the case at bar bear the burden of producing evidence demonstrating the discriminatory effect of the statute on non-residents. If a discriminatory effect is shown, the state has the burden of producing 'something to indicate that nonresidents constitute a peculiar source of evil at which the statute is aimed' . . . if the state makes such a showing, the challengers have the burden

> of showing the discrimination is "not supportable on the asserted grounds."

*Taylor v. Conta,* 106 Wis.2d 321, 316 N.W.2d 814, 823 n. 17 (1982) (citations omitted). *Contra, Silver v. Garcia,* 592 F.Supp. 495, 498 (D.P.R. 1984); *Glenovich v. Noerenberg,* 346 F.Supp. 1286, 1293 (D. Alaska), *aff'd,* 409 U.S. 1070, 93 S.Ct. 687, 34 L.Ed.2d 660 (1972) (state bears the burden of justification). We are persuaded by the Wisconsin Supreme Court's analysis, and agree with its conclusion that the burden of persuasion to demonstrate justification is properly placed on the state.

The analysis under Article I, section 8, clause 3 of the United States Constitution (the Commerce Clause) is quite similar, assuming that it is implicated.[4]

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[4] Early cases suggested that the Commerce Clause does not come into play until the fish are actually harvested, *e.g., McCready v. Virginia,* 94 U.S. 391, 396, 24 L.Ed. 248 (1876); *Toomer,* 334 U.S. at 394-95, 68 S.Ct. at 1161-62 (Commerce Clause not implicated by a nondiscriminatory tax where taxable event, the taking of shrimp, "occurs before the shrimp can be said to have entered the flow of interstate commerce."); *Alaska v. Arctic Maid,* 366 U.S. 199, 203, 81 S.Ct. 929, 932, 6 L.Ed.2d 227 (1961) (actual taking of fish is a "local activity" outside the Commerce Clause, despite the fact that the fish are destined for interstate commerce). *See also Tangier Sound Watermen's Ass'n v. Douglas,* 541 F.Supp. 1287, 1301-06 (E.D.Va.1982) (review of the cases); *State v. Reefer King Co., Inc.,* 559 P.2d 56, 64 (Alaska 1976), *modified on reh'g,* 562 P.2d 702 (Alaska 1977) (taxes distinguishing between floating and shorebased processors do not implicate Commerce Clause where statute excludes interstate movement of "floaters" from taxation).

Dictum in more recent cases, however, suggests the contrary.

> [While] at earlier times in our history there was some doubt whether Congress had power under the Commerce Clause to regulate the taking of fish in state waters, there can be no question today that such power exists where there is some effect on interstate commerce. The movement of vessels from one State to another in search of fish,

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." "Although the Clause thus speaks in terms of powers bestowed upon Congress, the Court long has recognized that it also limits the power of the States to erect barriers against interstate trade." *Maine v. Taylor,* 477 U.S. 131, 137, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986) (*quoting Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35, 100 S.Ct. 2009, 2015, 64 L.Ed.2d 702 (1980)). "[O]nce a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by

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and back again to processing plants, is certainly activity which Congress could conclude affects interstate commerce.

*Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 281-82, 97 S.Ct. 1740, 1750, 52 L.Ed.2d 304 (1977) (citations and footnote omitted).

*Hicklin* also suggests that the Commerce Clause applies to this case. "[T]he Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, *but destined for interstate commerce!*" *Hicklin,* 437 U.S. at 533, 98 S.Ct. at 2491 (emphasis added).

The Court has also held that state laws which ban the export from the state of fish taken instate, and state laws which ban the import of fish taken out of state, at least implicate the Commerce Clause. *Hughes v. Oklahoma,* 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (export, struck down); *Maine v. Taylor,* 477 U.S. 131, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986) (import, upheld). Despite its broad dictum in Douglas, the court in *Hughes* quoted with approval from Justice Field's dissent in *Geer v. Connecticut,* 161 U.S. 519, 538, 16 S.Ct. 600, 608, 40 L.Ed. 793 (1896) (Field, J., dissenting): "[w]hen any animal ... is lawfully killed for purposes of food or other uses of man, it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Hughes,* 441 U.S. at 329, 99 S.Ct. at 1732.

available nondiscriminatory means." *Taylor*, 477 U.S. at 138, 106 S.Ct. at 2447, *quoting Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736.[5]

The superior court, in granting summary judgment in favor of the state, adopted the reasoning of *Salorio v. Glaser*, 82 N.J. 482, 414 A.2d 943, *cert. denied*, 449 U.S. 874, 101 S.Ct. 215, 66 L.Ed.2d 94, *app. dism.*, 449 U.S. 804, 101 S.Ct. 49, 66 L.Ed.2d 7 (1980). In *Salorio*, New Jersey sought to impose an "Emergency Transportation Tax" (ETT) on nonresidents who used the state highway system. *Salorio*, 414 A.2d at 945. The *Salorio* court interpreted *Toomer* and *Mullaney* to permit a state to "impose upon nonresidents the additional expenses occasioned by their activities within the state, or the reasonable costs of benefits which they receive from the state." *Salorio*, 414 A.2d at 953. "[T]he State may exact from [nonresidents] a fair share of the cost of adequate transportation facilities without violating the Privileges and Immunities Clause." *Id.* 414 A.2d at 954.

We believe that the superior court erred in adopting *Salorio*. In our view, its focus is misplaced. Implicit in *Salorio* is the notion that it is permissible to require nonresidents to pay up to 100% of their *pro rata* share of expenditures regardless of what percentage of their *pro rata* share residents are in fact paying. In other words, *Salorio*, as applied to this case, seems to add up to a general proposition that the state may subsidize its own residents in the pursuit of their business activities and not similarly situated nonresidents, even though this results in substantial inequality of treatment. Such a principle seems economically indistinguishable

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[5] *Taylor* seems to squarely put the burden of justification on the state, whereas Privileges and Immunities Clause cases (as discussed *supra*) have been inconsistent on this issue. It would be anomalous, however, to conclude that a law facially discriminating against interstate commerce could pass muster under the Privileges and Immunities Clause yet fail under the Commerce Clause; both clauses have a common origin in the fourth article of the Articles of Confederation. *Baldwin*, 436 U.S. at 379, 98 S.Ct. at 1858.

from imposing a facially equal tax on residents and nonresidents while making it effectively unequal by a system of credits and exemptions. Such schemes have been struck down by the United States Supreme Court. *Austin, supra*; *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S.Ct. 228, 64 L.Ed. 460 (1920). *See also Williams v. Zobel*, 619 P.2d 422, 429-30 & 436-37 (Alaska 1980) (Rabinowitz, C.J., concurring).

The proper focus in our view is on whether residents and similarly situated nonresidents are being treated with substantial equality. The appropriate inquiry is thus whether all fees and taxes which must be paid to the state by a nonresident to enjoy the state-provided benefit are substantially equal to those which must be paid by similarly situated residents when the residents' *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.

The language of *Toomer* to the effect that it would be permissible "to charge nonresidents a differential which would merely compensate the state . . . for any conservation expenditures from taxes which only residents pay" requires additional discussion. We read this statement to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. That, however, is not the case in Alaska where a very high proportion of total state revenues are derived from petroleum production. For example, in fiscal year 1986, 86 percent of state revenues were so derived. *Trustees for Alaska v. State*, 795 P.2d 805-810 (Alaska 1990). Thus, in 1986, it would be correct to say that eighty-six cents of each dollar spent for conservation came from state revenue sources to which nonresident fishermen made no contribution. These revenues could have been used to benefit residents through various other programs and they are, analytically, equivalent to "taxes which only residents pay."

The point of *Toomer*, thus, is that the state may equalize the economic burden of fisheries management; where residents pay

proportionately more by way of foregone benefits than nonresidents for fisheries management, nonresidents may be charged higher fees to make up the difference. On this record we are unable to determine whether the higher fees charged nonresidents are excessive for this purpose. Thus, we are unable to say whether there is "a fairly precise fit between remedy and classification." *Taylor v. Conta,* 316 N.W.2d at 823 n. 17. The burden is on the state to make this showing.

We reverse the superior court's determination of this issue and remand for further proceedings consistent with this opinion.

### B. THE 3:1 FEE DIFFERENTIAL WAS AUTHORIZED BY STATUTE PRIOR TO THE EFFECTIVE DATE OF THE 1982 AMENDMENTS TO AS 16.43.160(b) (1/1/83)

We now address the class' contention that the 3:1 fee ratio was not authorized by statute prior to 1983. Alaska Statute 16.43.110(a), beginning in 1973 and continuing to the present day, provides that the CFEC "may adopt regulations, consistent with law, necessary or proper in the exercise of its powers or for the performance of its duties under this chapter." Ch. 79, § 1, SLA 1973. Former AS 16.43.160(a) mandated that "[t]he [CFEC] *shall* establish annual fees for the issuance and annual renewal of entry permits or interim use permits." (Emphasis added). The language limiting the CFEC's fees to "reflect the cost of administering this chapter" was removed by the 1977 amendments, along with an increase in the maximum fee from $100 to $750 and abolishment of gear licenses. Ch. 105, § 15, SLA 1977.

The analysis of this issue is governed by *Johns v. Commercial Fisheries Entry Commission*, 758 P.2d 1256 (Alaska 1988). Examining the validity of CFEC regulations is a three step process: we determine "'whether the legislature delegated rule-making authority to the [CFEC], whether the [CFEC] followed the Administrative Procedure Act in promulgating this regulation, and whether the regulation is consistent with and reasonably

necessary to implement the statutes authorizing its adoption.' " *Johns*, 758 P.2d at 1260, *quoting Chevron USA Inc. v. LeResche*, 663 P.2d 923, 927 (Alaska 1983). No one contends that the differential fee structure was not promulgated in accordance with the APA.

This court recognized in *Johns* that AS 16.43.110(a) is a broad delegation of power to the CFEC to adopt regulations "necessary or proper" to implement the purposes of the Act. *Johns*, 758 P.2d at 1256; *see also Kalmakoff v. State, Commercial Fisheries Entry Comm'n*, 693 P.2d 844, 853 (Alaska 1985). The purpose of the Limited Entry Act is "to promote the conservation and the sustained yield management of Alaska's fishery resource and the economic health and stability of commercial fishing in Alaska by regulating and controlling entry into the commercial fisheries in the public interest and without unjust discrimination." AS 16.43.010(a). Thus, if the 3:1 ratio regulation was a necessary or proper implementation of these purposes, it was authorized.

We conclude that this regulation was a proper implementation of the purposes of the Act. Conservation and sustained yield management are not free. What evidence of legislative intent there is from the 1977 amendments to the Act shows that Limited Entry Act fees were intended to substitute for the previous differential gear license fees as the means of ensuring nonresident contribution toward the cost. The maximum amount chargeable was raised from $100 to $750. Ch. 105, § 15, SLA 1977. The clause seemingly limiting the level of fee collection to CFEC expenditures alone was abolished. Ch. 105, § 15, SLA 1977. The executive branch also apparently believed that was the purpose of the amendment. We therefore reject the class' contention.[6]

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[6] The class appears to argue that AS 16.43.160(a) is a dedication of state taxes or licenses to a special purpose in contravention of Article IX, § 7 and an improper delegation of taxing power under Article X, § 2 of the Alaska Constitution.

The "special dedication" argument is frivolous. On the face of AS

## C. IS THE CLASS ENTITLED TO A REFUND SHOULD THEY PREVAIL ON REMAND?

The class also appeals the superior court's ruling that its members would not be entitled to a refund should they prevail on their constitutional claims. Since we are remanding the superior court's determination of the constitutional issues, we will address the issue of refund availability.

Alaska Statute 43.15.010(a) provides:

> The Department of Administration shall, with the approval of the attorney general and the Department of Revenue, refund to a taxpayer the amount of a tax paid to the Department of Revenue under protest and deposited in the treasury if (1) the taxpayer recovers judgment against the Department of Revenue for the return of the tax, or (2) in the absence of a judgment, it is obvious to the Department of Revenue that the taxpayer would obtain judgment if legal proceedings were prosecuted by the taxpayer.

We recently considered the scope and effect of this statute in *Principal Mutual Life Ins. Co. v. State, Division of Insurance,* 780 P.2d 1023 (Alaska 1989). Although we declined to defini-

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16.43.160(a), all funds collected from license fees are paid directly into the general fund. *Compare State v. Alex,* 646 P.2d 203, 207-11 (1982) ("earmarked" funds). The Article X, § 2 argument is equally meritless. The class argues that if we construe AS 16.43.160(a) to authorize the collection of fees by the CFEC in an amount greater than is necessary to fund the CFEC's issuance of licenses, this would give rise to an unconstitutional delegation of taxing power. Article X, § 2 simply has nothing to do with this case. It provides that "[a]ll local government powers shall be vested in cities and boroughs. The State may delegate taxing powers to organized cities and boroughs only." This is a limitation intended to simplify the structure of local government; nothing in this suggests any limitation on the state's ability to create a *state* agency and authorize it to set license levels. *Compare Alex,* 646 P.2d at 211-13.

tively resolve the question of whether AS 43.15.010(a) foreclosed a common law action in assumpsit for taxes wrongfully assessed and paid, we clearly held that both under the statute and common law, the taxpayer must formally "protest the payment of the tax at the time of payment in order to subsequently maintain" either a common law or statutory cause of action. *Principal Mutual*, 780 P.2d at 1028-30.

In *Pacific American Fisheries, Inc. v. Mullaney*, 13 Alaska 729, 105 F.Supp. 907, 909 (1952), the district court considered whether the excess fishing license fees collected under Alaska's previous 10:1 fee scheme, struck down in *Mullaney v. Anderson*, could be refunded under § 48-7-1, ACLA 1949, recodified into the current tax refund statute as AS 43.15.010. *See Principal Mutual*, 780 P.2d at 1028 n. 17. The district court held that the differential gear license fee was a tax within the meaning of the refund statute. *Pacific American Fisheries*, 105 F.Supp. at 908-09. The holding of *Pacific American Fisheries* finds continued support in the title of AS 43.15, "Refunds of Taxes and Licenses." *See also* AS 43.15.010(c) (providing for the refund of "license taxes" where a licensee is "prevented from using the license by court order. . . .") Thus, in the abstract, the class might avail itself of this statute to recover any unconstitutionally extracted fees.

However, the class seems to concede in its brief that the necessary protests were not made, instead presenting argument that the requirement of a protest was waived. The protest requirement may be waived by the taxing authority. *Principal Mutual*, 780 P.2d at 1029. On remand, the court should conduct appropriate inquiry into this issue.

We also note that the superior court has been operating under the assumption that a six-year statute of limitations applies to the class' sought after refund. However, there is a specific statute of limitations applicable to claims for tax refunds. Alaska Statute 43.05.275 provides that:

> *a claim for credit* or *refund of a tax under this title for which a taxpayer is required to file a return* or *pay a tax may be filed*

> *by the taxpayer* (1) before the later of (A) three years from the time the return was filed; or (B) two years from the time the tax was paid; or (2) *within two years from the time the tax was paid, if no return was filed.*

(Emphasis added). On remand, assuming that the class overcomes the hurdle of failing to protest payment, it is limited by this two year statute of limitations.

## III. CONCLUSION

The judgment of the superior court is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings consistent with this opinion.

## APPENDIX

| Year | Total No. of Permits | Number of Permits Held by Non-Res. | % Held |
|---|---|---|---|
| 1979: | 26,716 | 4,884 | 18% |
| 1980: | 29,432 | 5,548 | 19% |
| 1981: | 28,312 | 5,039 | 18% |
| 1982: | 29.021 | 5,181 | 18% |
| 1983: | 24,450 | 4,608 | 19% |
| 1984: | 29,322 | 4,718 | 16% |

| Total Costs of Enforcement & Conservation (in Thous.) | Fair Share of Non-Res. (Total Costs x %) (in Thous.) | Amount Paid by Non.-Res. (In Thous.) | % Paid |
|---|---|---|---|
| 18,151.7 | 3,267.3 | 1,492.2 | 8.22% |
| 17,901.2 | 3,401.2 | 1.240.4 | 6.93% |
| 23,316.1 | 4,196.9 | 1,465.1 | 6.28% |
| 28,986.5 | 5,217.6 | 1,397.8 | 4.82% |
| 30,999.0 | 5,889.8 | 1,335.6 | 4.31% |
| 34,023.2 | 5,443.7 | 1,381.3 | 4.06% |

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA THIRD JUDICIAL DISTRICT AT ANCHORAGE**

| | | |
|---|---|---|
| DONALD H. CARLSON, WARREN HART, GERARD HASKINS, STEPHEN R. LIBBY, EARL WEESE, and LYLA C. WEESE, Individually and as Class Representatives on Behalf of All Persons Similarly Situated, Plaintiffs, | ) | |
| vs. | ) | Case No. 3AN-84-5790 Civil |
| STATE OF ALASKA, COMMERCIAL FISHERIES ENTRY COMMISSION, Defendant. | ) | |

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**FINAL ORDER**

For the reasons set forth at the oral argument held on the Plaintiff's Second Motion for Summary Judgment on February 3, 1989,

IT IS ORDERED that summary judgment is granted to Defendant State of Alaska on all remaining claims and issues.

DATED this 21st day of February 1989.

/s/ Karen L. Hunt
Karen L. Hunt
Superior Court Judge

# RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

## CONSTITUTIONAL PROVISIONS

Article I, § 8 of the United States Constitution provides in pertinent part as follows:

> The Congress shall have Power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

Article IV, § 2 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several

## ALASKA STATUTES

### Title 16: Fish and Game

**Sec. 16.05.480. Commercial fishing license.** (a) A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents. Except for those which are also entry or interim-use permits, all commercial fishing licenses are nontransferable. The commercial fishing license shall be retained in the possession of the licensee, readily accessible for inspection at all times. No more than one fee may be charged annually against a person. For the purposes of this section, "commercial fishing license" includes entry permits and interim-use permits issued under AS 16.43 and crewmember fishing licenses.

(b) A person applying for a resident commercial license under this section shall provide the proof of residence that the department requires by regulation.

(c) [*Repealed § 12 ch 123 SLA 1978.*] (§ 6 art III ch 94 SLA 1959; am § 19 ch 131 SLA 1960; am § 1 ch 93 SLA 1966; am § 2 ch 42 SLA 1968; am § 8 ch 105 SLA 1977; am §§ 1, 2, 12

ch 123 SLA 1978; am § 1 ch 79 SLA 1982)

**Sec. 16.43.160. Fees.** (a) The commission shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits. The amount paid by a permit holder under the provisions of AS 16.05.480 shall be credited by the commission toward payment of the fee charged under this section. No more than one credit may be obtained annually by a person.

(b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

(c) The resident holder of an entry permit or interim-use permit who has a family income falling within the federal poverty guidelines, adjusted by the commission to reflect appropriate cost-of-living differentials, is subject to a maximum annual fee of $15.

(d) The commission may charge interest at a rate not to exceed the legal rate of interest established in AS 45.45.010 on fees more than 60 days overdue. (§ 1 ch 79 SLA 1973; am § 15 ch 105 SLA 1977; am § 4 ch 123 SLA 1978; am § 2 ch 79 SLA 1982; am §§ 3, 4 ch 22 SLA 1985)

## ALASKA ADMINISTRATIVE CODE

**20 AAC 05.240. SCHEDULE OF ANNUAL FEES.** (a) The annual fee for the issuance or renewal of an entry permit or interim-use permit is determined by the commission on a yearly basis according to the following:

(1) The resident annual fee for the issuance or renewal of an entry permit or interim-use permit in a limited fishery is .25 percent of the estimated value of the entry permit, rounded to the nearest fee class amount established in (4) of this subsection. The non-resident annual fee is three times this amount, as set out in (4) of this subsection. If insufficient data are available to determine the estimated value of an entry permit, the annual fee in a limited fishery will be calculated according to (2) or (3) of the subsection.

(2) The resident annual fee for the issuance or renewal of

an interim-use permit in an unlimited fishery is .25 percent of the estimated average gross earnings per permit in the most recent three years for which data are available, rounded to the nearest fee class amount established in (4) of this subsection. The non-resident fee is three times this amount, as set out in (4) of this subsection.

(3) Notwithstanding (2) of this subsection, the commission will, in its discretion, make an appropriate adjustment to a fee if more than one permit type allows the directed harvest of the same species with the same gear in the same area. If strict application of (1) and (2) of this subsection results in a fee that exceeds the level appropriate in light of the rate of economic return for the fisheries covered by that permit, the commission will, in its discretion, reduce the fee.

(4) The resident and non-resident annual fees are:

| FEE CLASS | ANNUAL FEE | |
|---|---|---|
| | Resident | Non-Resident |
| I | $ 250 | $ 750 |
| II | 200 | 600 |
| III | 150 | 450 |
| IV | 100 | 300 |
| V | 50 | 150 |

(5) Under (1) of this subsection, the entry permit value for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies.

(6) Under (2) and (3) of this subsection, the average gross earnings for each fishery will be estimated by the commission in the spring of the year immediately preceding the year for which the annual fee applies. These estimates will be based upon the most recent three years for which data are available. If less than three years of data are available for a fishery, the average will be calculated using the available years.

(b) Unless fishery resources, gear, or administrative areas are combined under this chapter, and except as provided in 20 AAC 05.120, a separate permit is required for each separate

fishery resource, gear, and administrative area.

(c) For the purpose of assessing the fees for the application for, or renewal of, entry and interim-use permits, a "resident" is

(1) repealed 11/26/87.

(2) one who, on the date of the permit application or renewal, and throughout the 12-month period before that date

(A) except for brief intervals, military service, attendance at an educational or training institution, or absence for good cause is, and was, physically present in the state with the intent to remain in the state indefinitely and to make a home in the state; and

(B) neither claimed nor received benefits as a resident of another state, territory or country.

(d) For the purposes of this chapter, criteria relevant to a determination of residence include, but are not limited to

(1) where an individual is registered to vote;

(2) where an individual claims residence on his income tax returns;

(3) where an individual registers or licenses his personal property, including but not limited to cars, boats, trucks and trailers;

(4) by which the state the individual is licensed to drive;

(5) in which state the individual maintains bank accounts, savings accounts, lines of credit, and other such financial relationships; and

(6) in which state the individual maintains a permanent place of abode.

(e) Alaska residents may apply for a reduced fee of $15 for the issuance of an interim-use permit or the annual renewal of an interim-use or entry permit if their total family income falls within the poverty guidelines for the Legal Services Corporation, as set out in Appendix A to 45 Code of Federal Regulations Section 1611, and as modified by Alaska regional cost-of-living differentials. A commission publication entitled "CFEC Map/Cost of

Living Differentials" contains maps designating the regions and charts showing regional cost-of-living differentials, and is incorporated in this section by reference. (EFF. 12/27/79, Register 72; am 1/2/81, Register 77; am 3/4/81, Register 78; am 1/29/82, Register 81; am 10/30/82, Register 84; am 12/30/82, Register 84; am 10/28/84, Register 92; am 12/29/84, Register 92; am 4/13/85, Register 94; am 9/26/85, Register 95; am 11/22/87, Register 104; am 11/26/87, Register 104; am 1/17/91, Register 117)